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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 445

THE SHELL COMPANY (PUERTO RICO) LTD.,
PETITIONER,

v.

SECRETARY OF THE TREASURY OF THE COMMONWEALTH OF PUERTO RICO,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

BRIEF FOR RESPONDENT IN OPPOSITION

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SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement	2
Argument	4
Conclusion	9

TABLE OF CITATIONS

Cases

Buscaglia v. *Ballester*, 162 F.2d 805, cert. den. in 332 U.S. 816 — 8

City of Detroit v. *Murray Corp.*, 355 U.S. 489 — 6

Fort Leavenworth R.R. Co. v. *Lowe*, 114 U.S. 525 — 9

Offutt Housing Co. v. *Sarpy County*, 351 U.S. 253 — 9

People of Puerto Rico v. *Shell Co.*, 302 U.S., 253, 82 L. Ed. 235 — 7

Puerto Rico, Drydock and Marine Terminals, Inc, v. *Secretary of the Treasury of P. R.*, No. 12006, decided by the Supreme Court of P. R. on June 22, 1962 — 4, 9

Silas Mason Co. v. *Tax Comm. of Washington*, 82 L. Ed. 187 — 9

Soltero v. *Descartes*, 192 F.2d 755, cert. den. 343 U.S. 904 — 8

Sonzinsky v. *United States*, 300 U.S. 506, 514 — 6

United States v. *City of Detroit*, 355 U.S. 466, 474 — 6

Walter v. *City of St. Louis*, 347 U.S. 231, 233 — 6

Statutes

	Page
Act of the Legislature of P. R. of February 16, 1903, Sect. 5 (28 L.P.R.A. §§ 41-47)	2, 4
Act No. 62 of June 10, 1955 (28 L.P.R.A. §§ 54-57, 1962 Cum. Supp.)	2, 5
Foraker Act, 31 Stat. 83	9
Military Leasing Act (10 U.S.C.A. § 2667	2, 9
Organic Act, 39 Stat. 968	9

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Opinions Below

The opinions and judgments below are printed in the Appendix to Petition for Writ of Certiorari.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition for Writ of Certiorari.[1]

[1] Hereinafter referred to as "the Petition".

Question Presented

Whether the Commonwealth of Puerto Rico can assess and impose property taxes on certain of petitioner's private real and personal property situated within and leased by petitioner from the United States.

Statutes Involved

The statutory provisions involved are the Military Leasing Act (10 U.S.C.A. 2667); Act of the Legislature of Puerto Rico approved on February 16, 1903 (28 L.P.R.A. 41-47); Act No. 62 of June 10, 1955 (28 L.P.R.A. 54-57, 1962 Cum. Supp.). The pertinent provisions of these statutes are printed in the Appendix, infra.

Statement

In 1942 the United States acquired through condemnation proceedings, 180.14 acres of land situated in the Municipality of Guaynabo, Puerto Rico. The Declaration of Taking issued on February 25, 1942 by James Forrestal, Acting Secretary of the Navy, specified that it was necessary that said land be taken for immediate public use by the United States of America for the establishment of fuel storage facilities, for use in connection with the Naval Air Station, San Juan, Puerto Rico.

On July 2, 1947 petitioner and other petroleum companies operating in Puerto Rico entered into a contract with the Secretary of the Navy to lease said land and other facilities. (R. 59-75). A Supplementary Agreement was entered into on March 29, 1948 (R. 75-79).

The lease was for a period of twenty years, renewable for an additional ten years, at a rental price of $15,000 per year. The contract provided that the "COMPANIES may

erect within the FACILITIES permanent improvements such as additional storage tanks, pipe lines, warehouses, field offices, pump houses, sanitary facilities, railroad sidings, and other improvements convenient to the marketing of petroleum and associated products, or to facilitate the operation of the storage facilities and the ready receipt, discharge and delivery of petroleum and associated products in both bulk and packages. . . ." and that all such additional improvements "shall remain the property of the COMPANIES and may be removed by the COMPANIES at any time prior to expiration or cancellation of this contract. . . ." (R. 66-67). It further provided that upon the expiration of the lease or of any renewal or extension thereof, "the COMPANIES shall, upon demand of the GOVERNMENT, remove all structures and improvements and restore the premises to the same condition as that at the time existing when first it discharged its obligation under Clause 3-a hereof, normal wear and tear excepted", and that the "GOVERNMENT shall have the right at the expiration or termination of this contract, or within a reasonable time thereafter, to take title to all structures and improvements placed upon the FACILITIES by the COMPANIES, and will pay the value therof to the COMPANIES." (R. 67-68).

On the fiscal years 1958-59, 1959-60, and 1960-61, the Secretary of the Treasury of Puerto Rico levied and collected property taxes on certain real and personal property belonging to petitioner and situated on a portion of the land leased by petitioner and other petroleum companies from the United States. Petitioner filed a complaint in the Superior Court of Puerto Rico, San Juan Part, praying for the refund of said taxes from the Secretary of the Treasury of Puerto Rico (R. 29-32). It was alleged that the taxes were illegally levied and collected because the property on which the taxes was levied was located on land of the exclusive property and jurisdiction of the Govern-

ment of the United States of America (R. 31-32). The Superior Court entered judgment (R. 37-41) dismissing the complaint on the authority of *Puerto Rico Drydock and Mooring Terminals, Inc. v. Secretary of the Treasury of Puerto Rico*, No. 12006, decided by the Supreme Court of Puerto Rico on June 22, 1962. (Appendix to Petition, pp. 36-44).

The Supreme Court of Puerto Rico refused to review the judgment of the Superior Court. (R. 96).

Argument

When the United States acquired the land involved in this case there was in effect the Act of the Legislature of Puerto Rico approved on February 16, 1903. Section 5 of this Act provided:

> "That consent be and is hereby given to the United States to acquire, for naval, military or other public purposes, by purchase or condemnation any lands within the island of Porto Rico, and when so acquired and possession thereof shall have been taken by the United States, all jurisdiction over such lands by the People of Porto Rico shall cease and terminate: Provided however, that upon the subsequent alienation by the United States of any land so acquired the People of Porto Rico shall again have jurisdiction thereover."

The Supreme Court of Puerto Rico held that a lease pursuant to the terms of the Military Leasing Act is an "alienation" under the local Act, and that by virtue of such lease the local government reacquired jurisdiction for the purpose of levying taxes on property located within the leased property. *Puerto Rico Drydock and Marine Terminals, Inc. v. Secretary of the Treasury of Puerto*

Rico, decided on June 22, 1962. (Appendix to Petition, pp. 36-45).

When the taxes involved in the instant case were levied, Section 5 of the Act of February 16, 1903 had been repealed by Act No. 62 of June 10, 1955 (28 L.P.R.A. §§ 54-57, 1962 Cum. Supp.). Section 4 of the 1955 Act reads as follows:

> "The jurisdiction granted shall continue only while the United States is the proprietor or is in possession of the lands and the lands are used for the naval, military, or other public purposes for which they were acquired. In the event that the United States ceases to be the proprietor of the lands or to be in possession of same, or in the event that they are not used for the purposes for which they were acquired, the Commonwealth of Puerto Rico shall again have jurisdiction over same." (28 L.P.R.A. 57, 1962 Cum. Supp.).

It is clear that under any of the two Acts the Commonwealth of Puerto Rico reacquired jurisdiction over the land leased by the United States.

Petitioner contends that since under the local statute reestablishment of local jurisdiction is unrestricted, any other exercise of local jurisdiction such as zoning, safety, traffic and similar regulations would be conceivable, thus depriving the United States of its exclusive jurisdiction over land owned by it in Puerto Rico. It is also alleged that the United States did not need the consent of the local government to acquire exclusive jurisdiction over the land in question.

These questions were not raised by petitioner in the trial court nor in the Supreme Court of Puerto Rico. See Complaint (R. 29-32), Petition for Review (R. 1-11), and Brief on Authorities (R. 21-27). On the contrary, petitioner's contention before the Supreme Court of Puerto Rico was

that the United States had exclusive jurisdiction over the leased land by virtue of the Act approved on February 16, 1903. Consequently, this Court should not consider these questions of law raised now for the first time and upon which the local courts did not have an opportunity to pass upon. See *Sonzinsky* v. *United States*, 300 U.S. 506, 514; *Walter* v. *City of St. Louis*, 347 U.S. 231, 233.

Nevertheless, we think that petitioner's contentions are without merit.

In the first place, petitioner's initial contention rests on a mere supposition. It is evident that the instant case does not deal with the application of zoning, safety or traffic regulations on the land owned by the United States. The question in the present case is limited to the imposition of local taxes on petitioner's private property located within land leased from the United States. On this matter, petitioner cannot avail himself of the United States Government constitutional immunity against State taxation, so as to enjoy an economic advantage and evade its local tax responsibility. The taxes were not levied neither directly nor indirectly against the United States or its property. On the contrary, they were imposed on the private property of the Shell Company (Puerto Rico) Ltd., which is a private corporation that had entered into a contract with the United States for the leasing of certain other facilities.[2] As this Honorable Court said in *United States* v. *City of Detroit*, 355 U.S. 466, 474:

> "Today the United States does business with a vast number of private parties. In this Court the trend has been to reject immunizing these private parties from nondiscriminatory state taxes as a matter of constitutional law. Cf. Penn Dairies v. Milk Control Comm'n, 318 U.S. 261, 270. . . ."

[2] Cf. *City of Detroit* v. *Murray Corp.*, 355 U.S. 489.

Petitioner argues that the United States Government is still "using" the leased premises for the purposes of the national defense. But it is clear, and petitioner so concedes, that the United States ceded to petitioner and other oil companies the *use and occupancy* of said premises by virtue of the contract entered between them. Obviously, the leased premises are being used by petitioner and the other oil companies in the furtherance of their own private interests. The fact that the rehabilitation and maintenance of the premises is beneficial to the United States Government does not mean that said Government is still "using" the premises.

Petitioner further contends that the United States did not need the consent of the local government to acquire exclusive jurisdiction thereon, because when the land was acquired Puerto Rico was a "territory" and such consent is only required in the case of a "state".

In the case of *People of Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 82 L. Ed. 235, cited by petitioner, this Honorable Court said:

> "The aim of the Foraker Act and the Organic Act was to give Puerto Rico full power of local self determination, with an autonomy similar to that of the states and incorporated territories. Gromer v. Standard Dredging Co. 224 U.S. 362, 379, 56 L. ed. 801, 805, 32 S. Ct. 499; Porto Rico v. Rosaly y Castillo, supra (227 U.S. p. 274, 57 L. ed. 508, 33 S. Ct. 352). The effect was to confer upon the territories many of the attributes of quasi-sovereignty possessed by the states—as for example, immunity from suit without their consent. Porto Rico v. Rosaly y Castillo, supra. By those acts, the typical American governmental structure, consisting of the three independent departments — legislative, executive and judicial — was

> erected. 'A body politic'—a 'commonwealth'—was created. 31 Stat. at L. 79 [7, chap. 191, 48 U.S. C.A. 733. The power of taxation, the power to enact and enforce laws, and other characteristically governmental powers were vested. And so far as local matters are concerned, as we have already shown in respect of the continental territories, legislative powers were conferred nearly, if not quite, as extensive as those exercised by the state legislature." (82 L. Ed. pp. 242-243).

Although it is true that Puerto Rico was a territory, it is no less true that the island possessed a governmental organization with autonomy and governmental powers similar to that of the States. Congress did not intend to exercise complete and exclusive legislative control over all matters concerning Puerto Rico. Nor Congress intended that the matter contained in the Act of February 16, 1903, i.e., the acquisition of jurisdiction by the United States Government over lands in Puerto Rico and the reacquisition thereof by the Government of Puerto Rico, be left to the sole will of the Federal Government. If such would have been Congress' intention it would have exercised over the 1903 Act its power to annul local legislation.[3] See §31 of the Foraker Act, 31 Stat. 83, and §57 of the Organic Act, 39 Stat. 968. In not doing so Congress implicitly recognized the validity and necessity of the local Act. See *Soltero* v. *Descartes*, 192 F.2d 755, certiorari denied 343 U.S. 904.

Finally, petitioner contends that the decision below upholds a local tax that has not been authorized by Congress in the Military Leasing Act of 1947. This question is not involved in the instant case and, consequently, this Honor-

[3] Cf. *Buscaglia* v. *Ballester*, 162 F.2d 805, certiorari denied in 332 U.S. 816.

able Court should not consider it.[4] The controversy in the instant case was circumscribed to the construction of the 1903 Act. The Supreme Court of Puerto Rico held in the *Puerto Rico Drydock case*, *supra*, that a lease amounts to an "alienation" under the 1903 statute, and that, consequently, by virtue of such "alienation" the Commonwealth of Puerto Rico reacquired jurisdiction for the purpose of levying taxes on private property situated within the property leased from the United States. This is a reasonable and correct construction of the local statute. Said construction constitutes no assault to federal rights nor frustration of the federal purpose of providing for the rehabilitation and continued maintenance of the leased facilities and for the construction of additional facilities.[5]

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

San Juan, Puerto Rico.

Respectfully submitted.

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[4] However, petitioner overlooks the decision in *Offutt Housing Co. v. Sarpy County*, 351 U.S. 253, and its implications.

[5] Cf. *Silas Mason Co. v. Tax Comm. of Washington*, 82 L. Ed. 187; *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525.

APPENDIX

(1) Military Leasing Act (10 U.S.C.A. 2667):

"(a) Whenever the Secretary of a military department considers it advantageous to the United States, he may lease to such lessee and upon such terms as he considers will promote the national defense or be in the public interest, real or personal property that is—

(1) under the control of that department;

(2) not for the time needed for public use; and

(3) not excess property, as defined by section 472 of title 40.

(b) A lease under subsection (a)—

(1) may not be for more than five years, unless the Secretary concerned determines that a lease for a longer period will promote the national defense or be in the public interest;

(2) may give the lessee the first right to buy the property if the lease is revoked to allow the United States to sell the property under any other provision of law;

(3) must permit the Secretary to revoke the lease at any time unless he determines that the omission of such a provision will promote the national defense or be in the public interest;

(4) must be revocable by the Secretary during a national emergency declared by the President; and

(5) may provide, notwithstanding section 303b of title 40 or any other provision of law, for the maintenance, protection, repair, or restoration, by

the lessee, of the property leased, or of the entire unit or installation where a substantial part of it is leased, as part of all of the consideration for the lease.

(c) This section does not apply to oil, mineral, or phosphate lands.

(d) Money rentals received by the United States directly from a lease under this section shall be covered into the Treasury as miscellaneous receipts. Payments for utilities or services furnished to the lessee under such a lease by the department concerned may be covered into the Treasury to the credit of the appropriation from which the cost of furnishing them was paid.

(e) The interest of a lessee of property leased under this section may be taxed by State or local governments. A lease under this section shall provide that if and to the extent that the leased property is later made taxable by State or local governments under an act of Congress, the lease shall be renegotiated."

(II) Pertinent provisions of Act of the Legislature of Puerto Rico approved on February 16, 1903 (28 L.P.R.A. 41-47):

Section 5 (28 L.P.R.A. 45):

"*Consent for United States to acquire lands by purchases or condemnation; jurisdiction of Commonwealth*

That consent be and is hereby given to the United States to acquire for naval, military or other public

purposes, by purchase, lease or condemnation any lands within the Island of Puerto Rico, and when so acquired and possession thereof shall have been taken by the United States, all jurisdiction over such lands by the Commonwealth of Puerto Rico shall ipso facto cease and terminate: *Provided, however*, That upon the subsequent alienation or the discontinuance of the lease by the United States of any or all lands so acquired, the Commonwealth of Puerto Rico shall again have jurisdiction thereover."

(III) Pertinent provisions of Act, No. 62 of June 10, 1955 (28 L.P.R.A. 54-57, 1962 Cum. Supp.):

Section 4 (28 L.P.R.A. 57, 1962 Cum. Supp.):

"*Reversion of jurisdiction to Commonwealth*

The jurisdiction granted shall continue only while the United States is the proprietor or is in possession of the lands and the lands are used for the naval, military, or other public purposes for which they were acquired. In the event that the United States ceases to be the proprietor of the lands or to be in possession of same, or in the event that they are not used for the purposes for which they were acquired, the Commonwealth of Puerto Rico shall again have jurisdiction over same."